INDO (M) ENGINEERING CO. BHD. (IN RECEIVERSHIP)

v.

MUNIANDY RENGASAMY & ORS.

SUPREME COURT, KUALA LUMPUR
MOHD. JEMURI SERJAN SCJ
HARUN HASHIM SCJ
AJAIB SINGH SCJ
[SC CIVIL APPEAL NO. 02-194-89]
27 MARCH 1990

COMPANY LAW: *Debenture - Receivers appointed - Termination of employees - Payment of termination benefits, pro rata bonus, leave pay and indemnity in lieu of notice - Whether rank in priority to debenture holders - Sections 191(1), 292(1)(b) Companies Act 1965 - Section 69 Employment Act.*

LABOUR LAW: *Receivership under debenture whether termination of benefits pro rata bonus, leave pay and indemnity in lieu of notice rank in priority to debenture holders - Section 69 Employment Act 1955.*

The respondent M and 12 others were employees of the appellant IME. On 31 December 1973, IME issued a debenture in favour of UAB for RM2 mil. On 11 July 1986, UAB under the debenture, appointed C & R as receivers of the property. C & R, in exercise of the powers under the debenture, terminated the services of M and the 12 others. M lodged a complaint to the Commissioner for Labour Port Klang under s. 69 of the Employment Act (the Act) against IME for non-payment of termination benefits, pro-rata bonus, leave pay and indemnity the said amounts in lieu of notice amounting to approximately RM1.8 mil; the commissioner granted M's application.

The company then commenced proceedings seeking declarations that the said amounts or the commissioner's order in relation to these amounts rank in priority to the debenture holders under s. 191 and s. 292(1) of the Companies Act 1965. The High Court granted the declarations; hence this appeal by M and 12 others.

The issue was whether the said amounts can be categorised either as wages, salary, vacation leave or superannuation or provident fund payments; if so, they would rank in their respective order of priority in accordance with s. 292(1)(b) of the Companies Act.

Held:

[1] There is no definition of "wages" in the Companies Act but in the application of s. 292(1) to s. 191(1) wages and salary referred to therein are wages or salary of an employee in respect of services rendered by him to the company within the period of four months before the appointment of the receivers. Pro rata bonus or bonus is not wages or salary in respect of services and has been described, as "nothing but a euphemism in addition to wages.

[2] (a) Pursuant to Article 41 of the collective agreement between IME and the Industrial Workers Union, on the date of the appointment of the receivers, the payment of bonus was not due and was not in respect of services rendered.

(b) In this case the termination benefits being payable under reg. 4(1) the Employment (Termination and Lay-off Benefits) Regulations 1980, became due only after the termination of employment and is not wages for the purpose of ss. 191(1) & 292(1)(b) of the Companies Act.

(c) The indemnity in lieu of notice was clearly not for work done or payment for services rendered and was not before the appointment of receivers as contemplated by s. 292(1)(b) of the Act - *Re VIP Insurance Ltd*.

[3] On the analysis of both the past and present Australian Companies Act, the Court concluded that since our own s. 292(1)(c) of the Companies Act 1965 followed the wording of the corresponding section of the Australian Companies Act as amended in 1974 'workers compensation' referred to therein can only mean compensation payable under the Workers' Compensation Act 1952; therefore payments made under s. 69 of the Employment Act do not come within the purview of s. 292(1)(c).

[4] By virtue of s. 21(4) of the Workers Compensation Act (which by implication, amended s. 191(1)) it is now possible to read into s. 191(1) of the Companies Act an additional preferential debt in the nature of amount due in respect of any compensation or liability for compensation accrued before the date of the appointment of the receivers; this is therefore compensation and may rank third priority.

[Appeal allowed.]

Cases referred to:

Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd. [1988] 2 MLJ 100
Re V.I.P. Insurance Ltd. and the Companies 3 ACLR 751
Yip Hock Chye & Ors. v. Santan Engineering Pte. Ltd. (in Receivership) & Anor. [1987] 2 MLJ 293

Legislation referred to:

Companies Act 1981 [Aus], s. 441(1)(f)
Companies Act 1965, ss. 191, 292(1), (1)(b), (1)(c), (3)
Employment Act 1955, ss. 69, (1)
Employment (Termination and Lay-off Benefits) Regulations 1980, reg. 4(1)
Companies Act 1961 (NSW) [Aust], s.292(1)(c)
Company Act (Vict), s. 292(1)(c)
Company Act [Aust], s. 292(1)(c)

Other source referred to:

Queensland, Western Australia, Tasmania and Australian Capital Territory, para. (c)

For the appellant - V.T. Nathan (Peh Lee Kheng Appearing together); M/s. Shearn Delamore & Co. and Drew & Napier

For the respondents - M.S. Murthy; M/s. Murthi & Partners

JUDGMENT

Mohd. Jemuri Serjan SCJ:

This is an appeal against the decision of the High Court given at Kuala Lumpur on 11 April 1989 granting a declaration that all amounts due to the respondents from the appellant being pro-rata bonus, termination benefits, leave pay and indemnity rank prior to the debenture holders by virtue of s. 191 read with s. 292(1)(A) of the Companies Act 1965.

The facts of the case in so far as they are relevant to the issues before us are these.

The respondent and 192 others were employees of the appellant, Indo Malaysia Engineering Company Bhd. on or about 31 December 1973, the said Indo Malaysia Engineering Company Bhd. issued in favour of United Asian Bank Bhd. of No. 4, Jalan Mountbatten, Kuala Lumpur a debenture to secure the payment from the said United Asian Bank Bhd. in the sum of RM2,000,000. On 11 July 1986, the said United Asian Bank Bhd. in exercise of the powers

contained in the said debenture appointed one Mr. Chua Teong Hooi and one Raja Arshad bin Raja Tun Uda of Price Waterhouse as receivers of the property therein contained. The said receivers in exercise of the powers conferred on them by the said debenture terminated the services of the plaintiffs on 11 July 1986. Thereupon the plaintiffs lodged a complaint to the Commissioner for Labour, Port Klang under s. 69 of the Employment Act 1955 against the defendant company for a non payment of termination benefits, pro rata bonus, leave pay and indemnity in lieu of notice amounting to RM1,778,795.79. After due inquiry and in exercise of the powers conferred on him by the Employment Act 1955 the Commissioner for Labour ordered the defendant company to pay to the plaintiffs the sum of RM1,778,795.79 being pro rata bonus, termination benefits, leave pay and indemnity in lieu of notice.

It is not disputed that on 31 July 1986 the plaintiff and the other 192 employees were paid a total sum of RM139,249.21 being one month's salary and arrears and pay in lieu of unconsumed leave. It is also not disputed that pay in lieu of leave unconsumed was paid on 13 July 1986 in the sum of RM73,873.59 and the claims of 13 ex employees who were already paid a total sum of RM365,196.83 were struck off. The consent order dated 10 March 1987 was obtained whereby the order made by the Commissioner for Labour, Port Klang dated 19 August 1986 was varied. Therefore the balance of RM1,339,725.37 is the amount of the claim in this appeal.

By an Originating Summons No. D-31-33-87 which was heard in Open Court on 17 April 1989 the respondents applied for the following relief namely:

(a) a declaration that, subject to s. 191 read with s. 292(1)A of the Companies Act 1965 all amounts due to the plaintiffs from Indo Malaysia Engineering Company Bhd. being pro rata bonus, termination benefits, leave pay and indemnity in lieu of notice amounting to RM1,778,795.79 ranks prior to the debenture holders.

(b) In the alternative a declaration that the order made on 4 September 1986 by the Commissioner for Labour, Port Klang ordering Indo Malaysia Engineering Company Bhd., to pay the plaintiffs a sum of RM1,778,795.79 being pro-rata bonus, termination benefits, leave pay and indemnity in lieu of notice, ranks prior to the debenture holders subject to s. 191 read with s. 292(1)(A) of the Companies Act 1965.

It is pertinent to mention here that the reference to s. 292(1)A in (a) and (b) above, was an error on the part of Counsel for the plaintiffs in the Court below because s. 292(1) does not have such a reference. Notwithstanding the glaring error the question for determination in the Court below and before us is whether the payments ordered under s. 69 of the Employment Act 1955 are preferential debts under s. 191(1) read with s. 292(1) of the Companies Act 1965. It is worthwhile to reproduce s. 191(1) and s. 292(1) in so far as they are relevant for the purpose of this appeal.

Section 191 reads:

> 191.(1) Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge or possession is taken by or on behalf of debenture holders of any property comprised in or subject to a floating charge, then if the company is not at the time in the course of being wound up, debts which in every winding up are preferential debts and are due by way of wages salary vacation leave or superannuation or provident fund payments and any amount which in a winding up is payable in pursuance of s. 292(3) or (5) shall be paid out of any assets coming to the hands of the receivers or other person taking possession in priority to any claim for principal or interest in respect of the debentures and shall be paid in the same order of priority as is prescribed by that section in respect of those debts and amounts.

(2) For the purpose of subsection (1) the references in s. 292(1)(b), (c), (d) and (e) to the commencement of the winding up shall be read as a reference to the date of the appointment of the receiver or of possession being taken as aforesaid (as the case requires).

Section 292(1) reads:

Subject to this Act, in a winding up there shall be paid in priority to all other unsecured debts:

(a) firstly, the costs and expenses of the winding up including the taxed costs of a petitioner payable under s. 220, the remuneration of the liquidator and the costs of any audit carried out pursuant to s. 281;

(b) secondly, all wages or salary (whether or not earned wholly or in part by way of commission) including any amount payable by way of allowance or reimbursement under any contract of employment or award or agreement regulating conditions of employment, of any employee not exceeding one thousand five hundred ringgit or such other amount as may be prescribed from time to time whether for time or piecework in respect of services rendered by him to the company within a period of four months before the commencement of the winding up;

(c) thirdly, all amounts due in respect of worker's compensation under any written law relating to worker's compensation accrued before the commencement of the winding up;

(d) fourthly, all remuneration payable to any employee in respect of vacation leave, or in the case of his death to any other person in his right, accrued in respect of any period before the commencement of the winding up;

(e) fifthly, all amounts due in respect of contributions payable during the twelve months next before the commencement of the winding up by the company as the employer of any person under any written law relating to employees superannuation or provident funds or under any scheme of superannuation or retirement benefit which is an approved scheme under the federal law relating to income tax; and

(f) sixthly, the amount of all federal tax assessed under any written law before the date of the commencement of the winding up or assessed at any time before the time fixed for the proving of debts has expired.

In our view for the payments made under s. 69 of the Employment Act 1955 to come within the purview of s. 191(1) and accorded priority under s. 292(1)(b) they must necessarily be categorised either as wages salary vacation leave or superannuation or provident fund payments. If they can be so categorised then they would rank in their respective order of priority in accordance with s. 292(1)(b). This is the crux of the matter before us in this appeal.

For some obscure reasons, the learned Judge eschewed discussion and consideration on this issue but proceeded to consider whether these payments could be brought within the ambit of s. 292(1)(c). Indeed he ruled that the terms "worker's compensation" used in s. 292(1)(c) were general words and capable of wide interpretation and therefore the payments under s. 69 of the Employment Act which he described as compensation fell within the meaning of s. 292(1)(c). This is evident from his judgment where he said:

Under s. 191 of the Companies Act 1965, it is provided that in the case where a receiver is appointed on behalf of the holders of any debenture of a company secured by a floating charge debts which are preferential debts under s. 292(3) or a winding-up shall have priority over any claim for principal or interest in respect of the debentures and shall be paid in the same priority as is prescribed in s. 292(3) or (5) of the Companies Act 1965.

The plaintiffs' claim, in my view, falls under para. (c) of s. 292(1) of the Companies Act 1965. Under s. 292(1)(c) of the Act it is provided that all amounts due in respect of worker's compensation accrued before the commencement of the winding-up shall be paid in priority to other unsecured debts. In relation to s. 191 of the Act such amount shall be paid in priority to debts to the debenture holders.

The question here is whether the termination benefits, pro rata bonus, leave pay and indemnity in lieu of notice is a worker's compensation as provided under s. 292(1)(c) of the Companies Act 1965. The words used under para. (c) of s. 292(1) is general and capable of wide interpretation. It provides for 'worker's compensation under any written law relating to worker's compensation.' It does not refer to any particular Act. It does not for instance specifically refer to Workmen's Compensation Act 1952. In my view it leaves sufficient scope to include compensation under any other written law. In my view compensation under s. 69 of the Employment Act 1955 falls within the meaning of s. 292(1)(c) of the Companies Act 1965.

We would deal first with the question whether pro rata bonus, termination benefits, leave pay and indemnity in lieu of notice could be characterised as wages, salary vacation leave or superannuation or provident fund payments under s. 191(1). Vacation leave had already been dealt with earlier on since it formed part of the payment made on 13 July 1986 and we would leave it out of our consideration in this appeal. For this purpose it would be useful in our opinion to refer to s. 69(1) of the Employment Act 1955 in order to determine the true character of these payments. Section 69(1) reads as follows:

The director general may inquire into and decide any dispute between an employee and his employer or between an employee and any person liable under this Act, or any regulations, order or other subsidiary legislation whatsoever made thereunder to pay any wages due to such employee where such dispute arises out of any term in the contract of service between such employee and his employer or out of any of the provisions of this Act, or any regulations, order or other subsidiary legislation whatsoever made thereunder, and in pursuance of such decision may make an order in the prescribed form for the payment by either party of such sum of money as he deems just without limitation of the amount thereof.

"Wages" means "all remuneration which is payable to an employee for work done in respect of his contract of service" but does not include:

(a) the value of any house accommodation or the supply of any food, fuel, light or water or medical attendance, or of any approved amenity or approved service;

(b) any contribution paid by the employer on his own account to any pension fund, provident fund, superannuation scheme, retrenchment, termination, lay-off or retirement scheme, thrift scheme, or any other fund or scheme established for the benefit or welfare of the employee;

(c) any travelling allowance or the value of any travelling concession;

(d) any sum payable to the employee to defray special expenses entailed on him by the nature of his employment;

(e) any gratuity payable on discharge or retirement;

or

(f) any annual bonus or any part of any annual bonus which is not payable under the contract of service

Pro rata bonus is payable under Article 41 of the collective agreement between Indo Malaysia Engineering Company Bhd. and the Industrial Workers Union and therefore is payment made under its terms of contract of service. The payment of termination benefits is covered by reg. 4(1) of the Employment (Termination and Lay-off Benefits) Regulations 1980 made under s. 60J of the Employment Act. Indemnity in lieu of notice is paid on the authority of s. 13(1) of the Employment Act. Having regard to the definition of wages in the Employment Act, none of these payments comes within the ambit of that definition.

If they are not wages within the meaning of the Employment Act 1955 can they still be regarded as wages or salary for the purpose of s. 191(1) of the Companies Act? There is no definition of "wages" in the Companies Act but in the application of s. 292(1) to s. 191(1) wages and salary referred to therein are wages or salary of an employee in respect of services rendered by him to the company within the period of four months before the appointment of the receivers. Pro rata bonus or bonus is not wages or salary in respect of services and has been described as "nothing else but a euphemism in addition to wages". See *Director-General of Inland Revenue v. Highlands Malaya Plantations Ltd.* [1988] 2 MLJ 100 at p. 105. According to Article 41 of the collective agreement between Indo Malaysia Engineering Company Bhd. and the Industrial Workers Union an annual bonus is payable at the end of each calendar year and to be paid on 7 January of the following year. It is obvious that on the date of the appointment of the receivers namely 11 July 1986, the payment of bonus was not due and besides it was not in respect of the services rendered. Similarly in the case of termination benefits, they are payable under reg. 4(1) of the Employment (Termination and Lay-off Benefits) Regulations 1980. Regulation 4(1) states that an employee is entitled to termination benefits payment where his contract of service is terminated for any reason whatsoever. In this case the termination benefits became due only after the termination of employment of the plaintiffs on 11 July 1986 and therefore are not wages for the purpose of s. 191(1) read with s. 292(1)(b).

There remains the question of indemnity in lieu of notice. This payment is clearly not for work done or payment for services rendered and was not paid before the appointment of receivers as contemplated by s. 292(1)(b). We need only cite the case of *Re: V.I.P. Insurance Ltd. and the Companies Act* No. 3 ACLR, 751 reported on 30 October 1978 which was referred to us by Counsel of the appellants at p. 144 of his Bundle of Authorities, the decision of the Supreme Court of New South Wales Equity Division. It was held by Needham J, the payments to employees in lieu of notice were not payments of wages or salary because wages or salary were consideration for work which was done by an employee while any payments in lieu of notice were made because the employee was not given the opportunity or not put under the responsibility or obligations of earning an equivalent amount of wages or salary. The case of *Yip Hock Chye & Ors. v. Santan Engineering Pte. Ltd. (in Receivership) & Anor.* [1987] 2 MLJ 293 does not advance the respondent's case and can be distinguished from the instant case. In that case it was clearly shown that there was an amendment to s. 382(2) of the Singapore Companies Act by the inclusion in the definition of "salary" any payment or account of wages or salary payable during a period of notice of termination or employment in lieu of notice such termination which is absent in the equivalent s. 292(1) of our Companies Act.

Counsel for the respondents also urged upon us to adopt the decision of Razak J, in the case of *Lean Chee Seng as Receivership and Manager of Inter-Plant (M) Sdn. Bhd. v. Pengarah Buruh Negeri Selangor* (unreported). The order made on 20 February 1986 was produced as the authority but we have no means of knowing the correctness of the judgment nor the reasons thereof.

In the result we are constrained to accept the view that none of these three payments is wages for the purpose of s. 191(1) read with s. 292(1) and therefore could not be paid in priority to any claim for principal or interest in respect of debentures.

There is the other matter concerning the application of s. 292(1)(c) of the Companies Act 1965 to the order made by the Commissioner for Labour under s. 69 of the Employment Act 1955 which calls for our determination. Learned Counsel for the appellant contended that s. 292(1)(c) was wrongly interpreted and in the course of his submission referred us to some Australian academic authorities where s. 292(1)(c) of the Australian Companies Act was discussed. We are not unmindful that our own Companies Act was modelled upon the United Kingdom Companies Act 1948 and the Australian Uniform Companies Act 1961 and we think it is proper to give these next book authorities due consideration. For one thing the books are informative.

It would be sufficient to mention here the Australian Company Law and Practice by Mr. Justice Wallace and J.Mcl. Young, Australian Company Law, 3rd Edn. by W.E. Paterson and Principles of Company Law, 4th Edn., by H.A.J. Ford. A study of Mr. Justice Wallace's book reveals that s. 292(2)(c) of our Companies Act is analogous to the corresponding s. 292(1)(c) of the State of Victoria Company Act. Section 292(1)(c) of the New South Wales Companies Act. Section 292(1)(c) of the New South Wales Companies Act 1961 are in *pari materia* with the corresponding section of the Companies Act of the State of *Queensland, Western Australia, Tasmania and Australian Capital Territory*, now known as the Northern Territory. This section reads as follows:

> (c) all amounts not exceeding in any particular case one thousand pounds due in respect of workers compensation under Workers Compensation Act 1926-1960, accrued before the commencement of the winding-up.

However, in the case of *Queensland, Western Australia. Tasmania and Australian Capital Territory*, para. (c) of that subsection was amended in 1964 whereby the words "any law relating to worker's compensation," were substituted for the words "Worker's Compensation Act 1926-1960" to be in line, only in this respect, with the corresponding section of the Victoria Companies Act.

Section 292(1)(c) of the Victoria Companies Act reads as follows:

> (c) thirdly, all amounts due in respect of worker's compensation under any law relating to workers compensation accrued before the commencement of the winding-up.

In our view the change in the wording of para. (c) does not in any way affect the original intention of the Legislature. It is also observed from these authorities that the corresponding section of the Companies Act of South Australia was almost similar in language as that of all the other States except that in place of "Worker's compensation" and "Worker's Compensation Act 1926-60" the words "Workmen's Compensation" and "Workmen's Compensation Act" 1932 were used therein.

On the ultimate analysis of both the past and present Australian Companies Acts, we are driven to the conclusion that since our own s. 292(1)(c) of the Companies Act 1965 followed the wording of the corresponding section of the Australian Companies Act as amended in 1964, "Workers Compensation" referred to therein can only mean compensation payable under our Worker's Compensation Act 1952.

Paterson and Ford discussed s. 441(1)(f) of the Australian Companies Act 1981, obviously the law in force presently. Unlike its predecessor s. 441(1)(f) was worded slightly differently. Paragraph (f) which is relevant reads:

> sixth, all amounts due in respect of injury compensation, being compensation the liability for which arose before the relevant date.

"Injury compensation" is defined to mean "compensation payable under any law relating to Workers' Compensation." We are therefore justified to conclude that the employment of the expression "injury compensation" in preference to "workers compensation" in s. 441(1)(f) of the Companies Act 1981 puts beyond doubt that the injury compensation contemplated by this section is a reference to compensation payable as a result of injuries suffered by an employee while in the course of employment.

On this premise in the result we are of the opinion the payments made under s. 69 of the Employment Act 1955 do not come within the purview of s. 292(1)(c).

There is one aspect of the appellant's submission that we think we should touch on here. It was submitted to us that s. 191(1) made no reference to worker's compensation while s. 191(2) on the other hand did not create priorities but merely served to modify paras. (b), (c), (d) and (e) of s. 292(1) with regard to the date of the commencement of the winding-up. Learned Counsel for the appellant therefore urged upon us to apply the dictum of Peh Swee Chin J, in the case of *Re: Golden Palace Musical Hall Sdn. Bhd.* [1988] 2 MLJ 63, where he said at p. 635:

> Section 191, in adopting the same order of priority for the same preferential debts during a winding up for the appointment of a receiver, expressly provides, save in two sub-sections of s. 292, that references to the winding up shall be read as a reference to the appointment of a receiver. By some deliberate omission, these two said subsections which refer, in one, to the claim for costs and expenses of winding up and in the other, to the claim of federal tax, have been excluded expressly from such extension. The result is irresistible that on an appointment of a receiver, these two claims will not be in the list of priority at all.
>
> The status of a federal tax as a preferential debt has thus been deliberately omitted from s. 191, and would appear at first not to be such a preferential debt on the appointment of a receiver.

In essence we were asked to rule that assuming the learned Judge was right in holding that the payments under s. 69 of the Employment Act 1985 were worker's compensation within the meaning of para. (c) of s. 292(1) but because s. 191(1) did not include worker's compensation within its scope these payments could not claim for priority.

We are not prepared to go as far as the learned Counsel suggested. In any event, the answer to the learned Counsel's submission lies in s. 21(4) of the Workmen's Compensation Act 1952, whereby, by implication, s. 191(1) was amended. By virtue of s. 24(1) it is now possible to read into s. 191(1) an additional preferential debt in the nature of amount due in respect of any compensation or liability for compensation accrued before the date of the appointment of the receivers. This amount is explicitly and indisputably compensation payable under the Workmen's Compensation Act 1952 and having regard to the view we hold on the

interpretation of para. (c) of s. 292(1), may rank third in priority. However as we have already ruled that payments under s. 69 of the Employment Act 1955 do not come within the ambit of s. 292(1)(c) the issue is only of academic interest.

We would under the circumstances allow this appeal with costs here and below.

Also found at [1990] 2 CLJ 930